Chua Lee Huat & other applications v Timbalan Menteri Hal-Ehwal Dalam Negeri, Malaysia & Anor

HIGH COURT (KANGAR) — CRIMINAL APPLICATION NO 44–25–96 CONSOLIDATED WITH CRIMINAL APPLICATION NOS 44–29–96 AND 44–30–96
VINCENT NG J
7 OCTOBER 1996

Administrative Law *— Remedies — Habeas corpus — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether valid — Whether Minister had acted mechanically without applying his mind in granting detention orders — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)*

Administrative Law *— Exercise of administrative powers — Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 — Whether Minister had acted mechanically without applying his mind in granting detention orders — Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)*

The applicants were detained under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). The applicants applied for writ of habeas corpus on the grounds that the Minister did not apply his mind in issuing the detention orders or had acted mechanically. The federal counsel contended that the detention orders were within the ambit of s 4(1) of the Ordinance and so long as the Minister had applied his mind to the general purpose to preserve public order, which is the intention of s 4(1), it did not matter under which limb of s 4(1) the detention order was issued.

Held, allowing the applications:

The question before the court was not whether the Minister had acted within the scope of s 4(1) of the Ordinance but whether the Minister had applied his mind in issuing the detention orders.

Though the Minister had acted as he did in good faith in the interest of public order, and hence the general nature of the detention was within the scope or ambit of s 4(1), the contents appearing on the face of the respective detention orders — when read in conjunction with the grounds of detention — plainly showed that the Minister had acted in a mechanical manner and did not apply his mind when he made the respective detention orders (see pp 397F and 400G).

[Bahasa Malaysia summary

Pemohon-pemohon telah ditahan di bawah s 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan tersebut'). Pemohon-pemohon membuat permohonan untuk writ habeas corpus atas alasan bahawa Menteri tidak memikirkan dengan teliti dalam mengeluarkan perintah tahanan atau telah bertindak secara mekanikal. Peguam persekutuan berhujah bahawa perintah tahanan adalah dalam lingkungan s 4(1) Ordinan tersebut dan selama Menteri telah memikirkan dengan teliti tujuan am untuk mengekalkan

ketenteraman awam, yang merupakan tujuan s 4(1), bahagian mana s 4(1) yang digunakan untuk mengeluarkan perintah tahanan adalah tidak penting. A

Diputuskan, membenarkan permohonan-permohonan:

Persoalan di hadapan mahkamah bukanlah sama ada Menteri telah bertindak di dalam skop s 4(1) Ordinan tersebut tetapi adalah sama ada Menteri telah memikirkan dengan teliti dalam mengeluarkan perintah tahanan. B

Walaupun Menteri telah bertindak demikian dengan suci hati dalam kepentingan ketenteraman awam, dan justeru itu ciri am penahanan adalah dalam skop atau lingkungan s 4(1), kandungan yang menonjol di perintah tahanan masing-masing — apabila dibaca bersama dengan alasan penahanan — jelas menunjukkan bahawa Menteri telah bertindak dalam cara mekanikal dan tidak memikirkan dengan teliti apabila beliau membuat perintah tahanan masing-masing (lihat ms 397G dan 400F).] C D

Notes

For cases on habeas corpus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 300–343.

For cases on exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1 –50. E

Cases referred to

Jamaluddin bin Othman [1989] 1 MLJ 368 (refd)

Lee Gee Lam v Menteri Hal Ehwal Dalam Negeri & Anor [1993] 3 MLJ 265 (refd) F

Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application [1993] 3 MLJ 673 (refd)

Minister for Home Affairs Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29 (refd)

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Legislation referred to

Emergency (Public Order and Prevention of Crime) Ordinance 1969 s 4(1)

V Shanmugam (*Shanmugam & Co*) for the applicants.

Abazafree (Federal Counsel) for the respondents. H

Vincent Ng J: All the applicants/detainees in the three above applications had been detained in the Pusat Pemulihan Akhlak, Simpang Rengam, Johore under s 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance'). I

The three applicants were each detained for two years in:

(i) Criminal Application No 44–25–46 ('the first applicant') with effect from 25 July 1995 under a detention order dated 25 July 1995 (see exh CYK-5 of encl 3);

(ii) Criminal Application No 44–29–96 ('the second applicant'), with effect from 27 January 1996 under a detention order dated 27 January 1996 (see exh EG-3 of encl 3); and

(iii) Criminal Application No 44–30–96 ('the third applicant') with effect from 27 January 1996 under a detention order dated 27 January 1996 (see exh RA-4 of encl 3).

By consent of all the parties hereto, the three applications were heard together on 24 October 1996 upon only one common and short point — namely, whether the respective detention orders show that the Minister had acted mechanically or arbitrarily without applying his mind.

It is common ground that in all the three detention orders, the Minister had applied the first limb of s 4(1) of the Ordinance. It is also common ground that the grounds of detention appended to the respective detention orders concerned charges of gangsterism and other violent criminal activities levelled against all the three applicants, including charges of murder and involvement in arms transaction against the first applicant; robbery, housebreaking and causing hurt against the second applicant and housebreaking and causing hurt against the third applicant.

It is trite law that though the court may not examine the allegations of fact against a detainee, it may look at the grounds of the detention. See *Jamaluddin bin Othman* [1989] 1 MLJ 368 (upheld by the (then) Supreme Court) and *Minister for Home Affairs Malaysia & Anor v Karpal Singh* [1988] 3 MLJ 29 (at p 31C).

Before me, the main thrust of the federal counsel's submission centered around his contention that the detention was within the ambit of s 4(1) of the Ordinance, and so long as the Minister had applied his mind to the general purpose of s 4(1), ie for the preservation of public order, it did not matter under which limb of sub-s (1) the detention order was issued.

With due respect, the federal counsel has missed the essence of the issue here. The question before this court was not whether the Minister had acted within the scope or ambit of the empowering provision — namely, s 4(1) of the Ordinance — but whether the Minister had applied his mind in the exercise of his extraordinary powers to detain a person without trial, considering the manner in which such powers were exercised, as reflected on the face of the order itself. It is settled law that a detainee is free to attempt to impugn the legality of his detention by raising — through the process of judicial review — the question as to whether the Minister has acted within the powers conferred in the particular case *and* whether the power to detain has been properly exercised. And, it is axiomatic that since the courts are precluded from delving into the mind of the Minister (often termed as 'subjective discretion' or 'satisfaction of the Minister'), the only means by which the courts could ascertain whether the Minister had abused his powers (eg in a mechanical or arbitrary exercise of such powers) would be to look at the face of the order itself as juxtaposed with the grounds of the detention.

With the Supreme Court's affirmation of the ratio in my earlier decision in *Lee Gee Lam v Menteri Hal Ehwal Dalam Negeri & Anor* (see [1993] 3 MLJ 265), it is now settled that the first and second limbs of

s 4(1) empowering the Minister to detain a person should be read disjunctively and the detention order itself is required to state clearly under which ground or limb of s 4(1) the person is detained (see *Menteri Hal Ehwal Dalam Negeri & Anor v Lee Gee Lam and another application* [1993] 3 MLJ 673). A

In that appeal against my decision, LC Vohrah J who delivered the judgment of the Supreme Court had this to say in his short but lucid and precise speech (at pp 676–677): B

> The learned judicial commissioner in allowing the two applications for habeas corpus adopted the reasons he gave in a previous hearing when he considered 11 criminal applications jointly, namely *Lim Thian Hok v Minister of Home Affairs & Anor and other applications* [1993] 1 MLJ 214 wherein he stated (at p 219): C
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> '... it seems quite clear to me that what is intended in s 4(1) of the Ordinance is to confer on the Minister the power to issue a detention order based on any one of two grounds which, by its very nature of expression, should be read disjunctively. D
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> The first limb of the section seeks to allow the Minister to detain:
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> (a) a person who has acted in any manner prejudicial to public order (or, presumably social order in our society), which encompasses a whole gamut of variegated offences such as smuggling, running illegal lotteries, preaching religious heresy, or advocating communist or racist ideology, all of which do not necessarily involve violence; E and
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> The second limb allows the Minister to detain:
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> (b) a person, if it is necessary for the suppression of violence or the prevention of crimes involving violence, obviously an appropriate provision for curbing gangsterism, gangland warfare and gang violence — which necessarily involve violence or the use of violence, as emphasized in the second limb. F
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> Furthermore, the interpolation in s 4(1) of the Ordinance, of the following words (underscored by me) '... it is necessary *that that person should be detained* or that it is necessary for ... *that that person should be detained* ...' (seemingly repetitive) shows a clear recognition by the legislature of the distinction between the first limb and second limb of the said section. G
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> The two above grounds for detention in (a) and (b) are so distinct and different is specie one to the other, that reading them conjunctively does not make for grammatical sense or consistency in the flow of the language ... . There being nothing in the Ordinance requiring that the detention order should be in any particular form, the order should be so worded as to show, at least on its face, under which particular limb of s (1) the detenu is being detained. (This reason, I may now further add, is as simple as it is mundane: many of those who fall within the first limb of detention have nothing to do with violence or gangland violence and may indeed be abhorrent to the use of violence to achieve their ends). H I
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> Compliance with this essential and mandatory procedure is necessary in order to dispel the view that the order was vague or was passed mechanically by merely reproducing the language of s 4(1) of the Ordinance. Such matters are subject to the scrutiny of the courts

A though, it is settled that once ground (a) or (b) (or even both with the conjunction 'and' used) is selected by the Minister, his subjective satisfaction as to manner of such selection and the allegations of fact to back-up the same is beyond question by the courts by virtue of s 7C of the Ordinance (s 11C of the Act).'

B Before us the learned senior federal counsel for the appellants whilst conceding that there are two limbs to s 4(1), challenged the decision of the learned judicial commissioner by arguing that since the grounds for the detention in the two detention orders were the reproduction of the exact words found in s 4(1) with the use of the preposition 'or' distinguishing the ground relating to public order under the first limb from that relating to suppression of violence under the second limb, it should not have mattered C whether the detention was made on the first ground or the second ground because (if we understood him correctly) the grounds upon which the detention was made constituted not a question of procedure but a question of substance which came solely within the subjective discretion of the Deputy Minister. In any event, he argued, the learned judicial commissioner should have treated one of the grounds as immaterial surplusage without D having the effect of invalidating the order.

After making plain the issue at hand, his Lordship LC Vohrah J then expressed the court's decision thus (at pp 677–678):

In this regard, we were alerted by counsel for the respondents to a well-E considered judgment of the High Court, *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*, wherein Edgar Joseph Jr J (as he then was), in allowing the detenu's application for habeas corpus had this to say (at pp 29–30):

'There had been a consistent current of judicial opinion in our courts, including the latest decisions of the Supreme Court, which indicate F that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with (see, for example, *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171, *Rajoo s/o Ramasamy v Inspector General of Police & Ors* [1990] 2 MLJ 87, and a series of G 11 recent appeals heard together, the first being *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297, in all of which the detainee succeeded on purely procedural or technical grounds).'

We were of the view that the above observations of the learned judicial commissioner and those of the learned judge reflect the correct attitude of H the courts in interpreting provisions relating to the exercise of the power of detention without a trial. The learned judicial commissioner was correct in allowing the respondents' applications for habeas corpus because, *on the face of it* (emphasis added), the order was vague as to whether the Deputy Minister had actually applied his mind to the particular circumstances of each respondent's case or whether he had exercised his power of detention I mechanically. As was stated by this court in the case of *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and other appeals* [1990] 2 MLJ 297 at p 299:

'The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals [sic] are concerned, this is the most correct approach for the courts to apply. There is hardly any

need to repeat what has been said on the principle to be followed by the courts in dealing with detention law. The principle was emphasized in *Re Tan Boon Liat @ Allen & Anor* [1977] 2 MLJ 108 at p 114, reiterated by this court in *PP v Koh Yoke Koon* [1988] 2 MLJ 301 and *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171.'

We would conclude by saying that in determining the propriety or legality of a detention order made under s 4(1), the *satisfaction of the Minister has to be considered in the light of the limbs under which he acted.* The determination of the question as to whether he addressed his mind to the relevant limb or for that matter to both the limbs in making his detention order is a procedural matter and if it is shown that there is some doubt as to which particular limb the Minister applied his mind to or whether he applied his mind to both the limbs together in grounding his order, the benefit of the doubt must be given to the detenu.

For the above reasons, the two appeals had to be dismissed. (Emphasis added.)

It is also a familiar proposition — too well-known to need citation of authority — that in cases of preventive detention, not only must the provisions of the statute authorizing detention be rigidly and meticulously complied with, it also has to be shown that the Minister had applied his mind in the essential decision-making process which resulted in the issuance of the detention order, failing which the detention order is liable to be set aside and the subject set free.

Though in the current applications — having regard to the expressed grounds of detention — I am completely convinced that the Minister had acted as he did in good faith in the interest of public order, and hence the general nature of the detention is within the scope or ambit of s 4(1), in my judgment, the contents appearing on the face of the respective detention orders — when read in conjunction with the said grounds of detention — plainly showed that the Minister had acted in a mechanical manner and did not apply his mind when he made the respective detention orders.

To summarize, it could perhaps be noted that whereas in *Lee Gee Lum* I had allowed the application on the ground that there was sufficient indication that the Minister had not applied his mind as the orders were vague as to which limb of s 4(1) the applicants therein had been detained under, in the instant applications, I am likewise minded to hold that the Minister had not applied his mind or had acted mechanically when he applied the wrong limb of s 4(1) to the expressed grounds of the detention; a fortiori, considering that the two limbs of this provision have already been judicially adjudicated as separable and clearly distinguishable one from the other.

The result therefore is that the three above applications for habeas corpus must be and are allowed and I directed that the three respective applicants be set at liberty forthwith.

Applications allowed.

Reported by Zahid Taib